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The Effect of People v. Vernace on a Criminal Defendant's Right to Due Process and a Speedy Trial in New York

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RECENT DEVELOPMENT IN NEW YORK LAW

THE EFFECT OF *PEOPLE V. VERNACE* ON A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS AND A SPEEDY TRIAL IN NEW YORK

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INTRODUCTION

In 1978, the New York Court of Appeals announced that it had never drawn a fine distinction between due process[1] and speedy trial[2] standards.[3] Rather, "an untimely prosecution may be subject to dismissal even though, in the interim, the defendant was not formally accused, restrained or incarcerated for the offense."[4] To determine a violation of either right, the

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[1] Claims of prejudice involving pre-indictment delays are governed by the Due Process clause. *See* U.S. CONST. amend. V. Generally, the United States Supreme Court has held that delays in bringing a defendant to trial may violate his right to a fair trial; however, the Court has found the Statute of Limitations to be the primary safeguard in this area. *See* United States v. Marion, 404 U.S. 307, 325–26 (1971).

[2] A defendant's right to a speedy trial is intended to protect the accused from "undue and oppressive incarceration prior to trial" and "to minimize anxiety and concern accompanying public accusation." *Marion*, 404 U.S. at 320 (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)).

[3] People v. Singer, 376 N.E.2d 179, 186 (N.Y. 1978).

[4] *Id.*; *see* People v. Staley, 364 N.E.2d 1111, 1114 (N.Y. 1977) (stating that charges must be dismissed when there is a long enough delay, regardless of whether the defendant's ability to present a defense has been prejudiced); People v. Winfrey, 228 N.E.2d 808, 812 (N.Y. 1967) (holding that once a criminal proceeding is initiated, the prosecution has an obligation to prosecute without unreasonable delay); People v. Wilson, 171 N.E.2d 310, 313 (N.Y. 1960) (holding that after the indictment, the defendant has the right to commencement of the trial without

court of appeals developed a balancing test that has been consistently reaffirmed in subsequent cases.[5] The balancing test consists of five factors set forth in *People v. Taranovich*:

> (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay.[6]

While these factors may appear clear on their face, dispute has arisen as to whether a defendant is required to make a showing of "actual prejudice" for a dismissal to be granted.[7] In addition, issues concerning what constitutes a "reasonable" delay created by the district attorney[8] and how the "nature of the underlying charge" factors into the overall balancing test[9]

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undue delay).

[5] *See* People v. Vernace, 756 N.E.2d 66, 67 (N.Y. 2001); *Singer*, 376 N.E.2d at 185; People v. Taranovich, 335 N.E.2d 303, 306 (N.Y. 1975).

[6] *Taranovich*, 335 N.E.2d at 306.

[7] *See Singer*, 376 N.E.2d at 186–87 (indicating that the defendant may be entitled to dismissal without a showing of actual prejudice); *Staley*, 364 N.E.2d at 1113–14 (allowing the dismissal of an indictment, in the absence of actual prejudice to the defendant, because of an unreasonable delay).

[8] *See* People v. Lesiuk, 617 N.E.2d 1047, 1050 (N.Y. 1993) (holding that a delay of eight months between incident and arrest was permissible in a narcotics case where an undercover officer would have been jeopardized if defendant had been arrested earlier); *Singer*, 376 N.E.2d at 187 (holding that a three-year delay in arresting the defendant, because police were waiting for him to get released from an out of state prison, was not an acceptable reason for delay in prosecution); People v. Jones, 699 N.Y.S.2d 447, 447–48 (2d Dep't 1999) (holding that the delay in indictment was justified because it was due to time spent attempting to locate the defendant); People v. LaRocca, 568 N.Y.S.2d 431, 432 (2d Dep't 1991) (holding that the delay in indictment between 1978 and 1984 was justified given that a potential witness was unavailable to local authorities because he was being debriefed by the Federal Bureau of Investigation); People v. Bryant, 411 N.Y.S.2d 932, 936 (2d Dep't 1978) (holding that an almost seven-month delay prior to indictment was permissible in a narcotics case where a premature indictment would have jeopardized a confidential informant as well as a larger investigation).

[9] *See* People v. Johnson, 342 N.E.2d 525, 529–30 (N.Y. 1975). In *Johnson*, the court of appeals clarified its *Taranovich* holding with respect to the role of the "nature of the underlying charge" in its balancing test, stating:

> [T]he nature of the crime is relevant because the prosecutor may understandably be more thorough and precise in his preparation for the trial of a [serious felony] then [sic] he would be in prosecuting a misdemeanor. In other words what may be considered an unreasonable delay in preparing a minor, relatively common street crime for trial may be tolerable when a serious or complex charge is involved.

Id. at 530. Whether the "nature of the underlying charge" should be looked at for purposes other than gauging a reasonable time in which a district attorney would be

remain subject to dispute. In *People v. Vernace*,[10] the New York Court of Appeals was once again confronted with these issues and set new precedent that may jeopardize the due process rights of future criminal defendants.

I. THE FACTS OF *PEOPLE V. VERNACE*

The events resulting in the *Vernace* case began on April 11, 1981 at the Shamrock Bar in Richmond Hill, Queens.[11] As Frank Riccardi and his date were seated together at the bar, a young man accidentally spilled his drink upon the woman's dress.[12] Frank Riccardi issued a heated response as the bartender struggled to act as peacemaker.[13] One of the bar's owners, John D'Agnese, unavailingly tried to settle things down but was forced to ask Riccardi to leave.[14] Before Riccardi left, however, he threatened: "I will be back!"[15] Riccardi did indeed return some twenty minutes later, with two other men, seeking vengeance upon D'Agnese.[16] After a brief scuffle between D'Agnese and two of the assailants, the unfortunate bar owner was shot and fatally wounded by the third assailant.[17] D'Agnese's friend and co-owner of the bar, Richard Godkin, ran to give assistance, but he also was shot and killed.[18]

The Queens Homicide Squad quickly identified the three assailants through information provided by the bartender and Linda Gotti, a patron who witnessed the crimes, as well as through a follow-up investigation.[19] The bartender identified the assailants as "Frankie the Geech," "Ronnie the Jew," and "Pepe." Through further investigation, the Homicide Squad determined that "Frankie the Geech" was Frank Riccardi and "Ronnie the Jew" was Ronnie Barlin. The Federal Bureau of Investigation (FBI) was able to provide the Queens detectives with "Pepe's" address and telephone number as well as the name of "Jackie,"

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able to prepare a certain type of case remains unclear. *See id.*

[10] 756 N.E.2d 66 (N.Y. 2001).

[11] *Court Decisions*, N.Y.L.J., July 16, 1999, at 34.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

the woman with whom he lived.[20] After reviewing a photograph, the bartender and Linda Gotti identified "Pepe" as one of the three men involved in the double murder, and Jacqueline Settles ("Jackie") confirmed that the man in the photograph was in fact her husband, Robert Vernace.[21] Even given these identifications, the police and prosecutors seemingly did not pursue Vernace with the same force as they did Riccardi and Barlin. Despite similar evidence against all three perpetrators, the Queens District Attorney only presented cases against Riccardi and Barlin to a grand jury. In April 1982, indictments were handed down against Riccardi and Barlin. Riccardi remained at large, and Barlin was subsequently arrested.[22] At a pre-trial hearing on May 3, 1983, after Linda Gotti recanted her identification of Barlin and the bartender, who was unable to be found, could no longer testify, charges against Barlin were dropped.[23] The record showed that the case remained inactive until 1997, when Detective Thomas Mansfield of the "Cold Case Squad" began reviewing it.[24]

Upon review of the case, Detective Mansfield began an investigation, which included interviewing the recently located bartender and approximately a dozen other witnesses. After

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[20] *Id.*

[21] *Id.* Justice Eng also wrote in his opinion, "Oddly, the surveillance photographs were never shown to any of the 20-25 other witnesses. It must be assumed that the police were confident that they possessed probable cause for the arrest of the defendant based upon the two positive identifications . . . ." *Id.* This finding of fact by Justice Eng is in conflict with the appellate division finding that "at the time of the shootings there were 20 to 25 patrons present in the tavern, detectives testified that most of them refused to become involved and denied being present." People v. Vernace, 711 N.Y.S.2d 492, 494 (2d Dep't 2000).

[22] Justice Eng, in his *Vernace* opinion, wrote:

> On March 25, 26 and April 2, 1982, the Queens County District Attorney . . . presented evidence to the Grand Jury concerning the April 11, 1981 shootings of John D'Agnese and Richard Godkin at the Shamrock Bar. Some nine witnesses testified, including the bartender, Linda Gotti and five other patrons of the Shamrock Bar, and a police officer. Notwithstanding the fact that the bartender had, months before, identified the third man as "Pepe" and had later positively identified him from the surveillance photo, this witness was never asked to identify Vernace in the Grand Jury. This inaction on the part of [the District Attorney] was in direct contrast to the manner in which the witness was questioned concerning the other two perpetrators.

Court Decisions, *supra* note 11, at 34.

[23] *Vernace*, 711 N.Y.S.2d at 494.

[24] *Id.*

conducting these interviews, Mansfield attempted to find the defendant with the use of motor vehicle records and FBI photographs. Witnesses who had been present at the incident were able to identify the defendant from these photographs. Two of these witnesses identified the defendant as one of the men responsible for the shooting of Mr. D'Agnese.[25]

The defendant, Robert Vernace, was subsequently taken into custody on November 22, 1998 and arraigned two days later.[26] In July of 1999, the New York State Supreme Court dismissed the indictment against Vernace, finding that the "grossly unreasonable delay" in prosecuting Vernace amounted to a denial of his right to due process.[27] On appeal the decision was reversed and the indictment reinstated by the Second Department of the New York Appellate Division in a three-to-two opinion dated July 31, 2000.[28]

II. THE COURTS CONFRONT *PEOPLE V. VERNACE*

The appellate division found that, given the ruthlessness and cold-bloodedness of the murders, the prosecutor's decision to reexamine the case after the witnesses' fears faded was

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[25] *Id.* The trial court's opinion describes some disturbing facts not present in the appellate division's opinion concerning these "new" witness interviews:

> On April 28, 1998, a witness in the state of Florida identifies the defendant from the night of the shooting. On the next day, a second witness, also residing in Florida, again identifies the defendant from the photo array. This witness had originally identified the defendant from the Bottari surveillance photo on October 8, 1981. Now Detective Mansfield has two positive identifications of the defendant and is poised to prepare the case for the Grand Jury. What must be disturbing to the detective is that the "new witness" also testified in the first Grand Jury, but was never asked to identify the defendant. In fact, according to the testimony at the Singer hearing he was never shown the surveillance photo during the initial investigation.

Court Decisions, *supra* note 11, at 34.

[26] *Vernace*, 711 N.Y.S.2d at 495.

[27] *Court Decisions*, *supra* note 11, at 34. Justice Eng further wrote:

> Regardless of whether or not Robert Vernace was present in the Shamrock Bar during the early morning hours of April 11, 1981, there was competent evidence known to the police and the District Attorney, relatively soon after the crime, to have permitted reasonable men and women to indict the defendant for the D'Agnese-Godkin murders in 1982. For reasons not adequately brought forth at the Singer hearing, a decision not to prosecute the defendant was made within the then prosecutor's office.

Id.

[28] *Vernace*, 711 N.Y.S.2d at 493.

reasonable.[29] The court accepted the testimony of detectives who contended that, although there were twenty to twenty-five people in the bar during the shooting, most of the patrons did not cooperate and denied being present.[30] In addition, while noting the loss of the .38 caliber revolver linked to the crime as well as the loss of several police reports, the appellate division found that far from prejudicing the defendant, these events rendered the People's prosecution of Vernace more difficult.[31] The appellate court noted that unspecified claims of potential prejudice do not constitute actual prejudice.[32] Furthermore, the prosecutor did not deliberately extend the length of inactivity in this case in order to gain any unfair advantage.[33]

The court of appeals, in a memorandum opinion, agreed with the appellate division's findings of fact and law.[34] While the court acknowledged that the delay in indictment had been extensive, it found that the four other factors of the *Taranovich* balancing test favored the prosecution.[35] The court clearly noted the seriousness of the charge and specifically pointed out the fact that it occurred over a spilled drink.[36] The appellate division previously stated that the double homicide reflected "a particular callousness toward human life."[37] The court of appeals further found that the defense had not been impaired and that instead of giving the prosecutor any unfair advantage, the delay actually rendered proving the case against Vernace more difficult.[38] Finally, the court held that the decision to delay Vernace's prosecution was made in good faith and for sufficient reasons and, therefore, did not constitute a violation of due process.[39]

Judge Levine of the New York Court of Appeals wrote a strong dissent in *Vernace*. He stressed the fact that Vernace had been identified early on in the investigation and that police had known his whereabouts.[40] In addition, given the fact that all

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[29] *Id.* at 494.
[30] *Id.*
[31] *See id.* at 495.
[32] *See id.*
[33] *See id.*
[34] *See* People v. Vernace, 756 N.E.2d 66, 67 (N.Y. 2001).
[35] *See id.* at 67–68.
[36] *See id.* at 67.
[37] *Vernace*, 711 N.Y.S.2d at 493.
[38] *See Vernace*, 756 N.E.2d at 67.
[39] *See id.* at 67–68.
[40] *See id.* at 68 (Levine, J., dissenting).

three assailants had been identified by the bartender, the dissent argued that "the evidence against [the] defendant at [the time of the grand jury investigation] was indistinguishable from that against Riccardi and only differed from [that against Barlin] in the respect that Barlin was the only one of the three suspects arrested" and then identified in a lineup by Linda Gotti.[41] Furthermore, the dissent pointed out that the prosecutor decided to bring murder charges before the grand jury only against Riccardi and Barlin, for reasons that were not revealed at the *Singer* hearing.[42] The dissenting opinion focused on the total lack of action by the prosecutor and by law enforcement for fourteen years. Judge Levine stated that "we view an unjustified, protracted pre-indictment delay in prosecution, even one far shorter than 14 years, as a deprivation of a defendant's State constitutional right to due process, without requiring a showing of actual prejudice."[43] The dissent found the argument that delay was reasonable in light of witness fear and reluctance to testify devoid of evidentiary support given that, among other things, the prosecution of Riccardi and Barlin went forward with the same evidence and lack of witness cooperation.[44] Rather, Judge Levine argued that the "evidence points only to complete prosecutorial inertia and inattention, as reflected in the loss by the district attorney's office of both a gun fired during the homicides and the complete original file [for the case]."[45]

III. ANALYSIS OF THE RULING IN *PEOPLE V. VERNACE*

In past cases, New York courts that have rejected claims of violations of due process or the right to a speedy trial have relied on very specific and limited-in-scope justifications for such delay.[46] In *People v. Lesiuk*[47] and *People v. Bryant*,[48] delays

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[41] *Id.* (Levine, J., dissenting).

[42] *Id.* (Levine, J., dissenting). At a Singer hearing, the prosecutor must show good cause for a delay between arrest and prosecution for a crime. *See* N.Y. v. Singer, 44 376 N.E.2d 179, 186–87 (N.Y. 1978)

[43] *Id.* at 69 (Levine, J., dissenting).

[44] *See id.* (Levine, J., dissenting).

[45] *Id.* at 69–70 (Levine, J., dissenting).

[46] *See* People v. Johnson, 342 N.E.2d 525, 530–31 (N.Y. 1975).

[47] 617 N.E.2d 1047, 1049–50 (N.Y. 1993) (holding that there was no "reasonable probability" that the outcome would have been different were it not for the delay, and, therefore, the delay was immaterial).

[48] 411 N.Y.S.2d 932, 936 (2d Dep't 1978) (stating that the district attorney determines the timing of a criminal prosecution and the police department dictates

necessary to protect undercover officers or confidential informants were held permissible when the defendants were indicted in a narcotics case immediately after the conclusion of the overall investigation.[49] The appellate division excused a six-year pre-indictment delay in *People v. Suero*,[50] in which the police department was found to be "reasonably diligent" in finding the murder suspect and there was "no indication of bad faith by law enforcement or specific prejudice to [the] defendant."[51] Finally, in *People v. LaRocca*,[52] a six-year pre-indictment delay in a murder case was found to be justified when a potential witness was unavailable to local authorities because he was being debriefed by the FBI.[53]

All of these justifications for pre-indictment delays are very specific in nature and appear to be limited in scope since they do not go on indefinitely. Either a larger investigation ends, a witness is made available by the federal authorities, or, after a continued and "reasonably diligent" search, a defendant is found. It seems that all of these justifications are the product of rational decision-making at the commencement of the delay, rather than excuses made in hindsight. In his dissent, Judge Levine seized on this issue when he stated:

> Even if . . . the majority is correct in holding that there is some evidence of witnesses' fear or reluctance to testify which would support the Appellate Division's finding that the prosecution had good cause not to seek the indictment of defendant in 1982–1983, there is absolutely no support in the record and not even a finding by the Appellate Division, that a conscious decision was made, based upon the recalcitrance of witnesses, to defer prosecution of defendant for the next 14 years.[54]

The delay in *Vernace* was not the product of a "conscious decision" and it also was considerably longer than the delays in the cases previously mentioned. In addition, the first time that

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the timing of a police investigation).

[49] *Lesiuk*, 617 N.E.2d at 1050; *Bryant*, 411 N.Y.S.2d at 936.

[50] 654 N.Y.S.2d 114, 115 (1st Dep't 1997) (holding that since there was neither bad faith exhibited by the law enforcement nor specific prejudice to the defendant, the delay was permissible).

[51] *Id.*

[52] 568 N.Y.S.2d 431, 432 (2d Dep't 1991) (concluding that the seventeen-year delay did not deprive the defendants of his due process rights).

[53] *Id.* at 431–32.

[54] People v. Vernace, 756 N.E.2d 66, 69 (N.Y. 2001) (Levine, J., dissenting).

any evidence of witness' fear or recalcitrance became apparent occurred months after the district attorney had declined to proceed against Vernace before a grand jury.[55] The justification offered in the *Vernace* case is also considerably more vague than the reasons previously accepted by New York courts. The court of appeals simply wrote that "[w]hile 20 to 25 people allegedly were in the bar at the time of the murders, virtually all of them denied seeing the crime."[56] This is a stronger statement than that which was made by the appellate division, which announced that "most" of the witnesses would not cooperate.[57] Why the court of appeals found this justification so convincing is unclear given that: (1) it was not the product of a "conscious decision," (2) it was fairly vague considering past justifications accepted by the court, (3) it was not pursued for fourteen years, and (4) it was only taken up again due to a "Cold Case" detective stumbling upon it.[58]

The "nature of the underlying charge" in this case raises questions about the policy considerations underlying the inclusion of this factor in the *Taranovich* balancing test and how the factor is to be weighed in that test. It appears that in *Vernace* the appellate division was concerned with the "inherent seriousness of homicide" as well as the "State's concurrent interest in seeking justice for such a crime" when evaluating this factor.[59] The appellate division "repeatedly emphasized the 'particularly heinous' nature of the charges in considering whether Mr. Vernace's speedy-trial right [or due process right was] being abused."[60] Similarly, the court of appeals spoke of the "vicious" nature of the crime.[61] While these statements may be true, it is difficult to see why they justify inaction in a murder case but not in a case involving a lesser criminal charge. It appears that none of these concerns have anything to do with

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[55] Indictments against Riccardi and Barlin were handed down in April of 1982; Linda Gotti recanted her testimony in March of 1983. Therefore, it is still not apparent why an indictment against Vernace was not sought at the same time indictments were obtained against Riccardi and Barlin. *See supra* notes 23–24 and accompanying text.

[56] *Vernace*, 756 N.E.2d at 67.

[57] *See* People v. Vernace, 711 N.Y.S.2d 492, 494 (2d Dep't 2000).

[58] *Vernace*, 756 N.E.2d at 69–70 (Levine, J., dissenting).

[59] *Vernace*, 711 N.Y.S.2d at 493.

[60] Michael A. Riccardi, *Split Panel Allows Prosecution of Murder Suspect After 17 Years*, N.Y.L.J., Aug. 4, 2000, at 1.

[61] *Vernace*, 756 N.E.2d at 67.

such lengthy delays. In fact, when the *Taranovich* test was first developed, the court announced the rationale of looking to the "nature of the underlying charge" by stating that a "prosecutor may understandably be more thorough and precise in his preparation for trial of a class C felony than he would be in prosecuting a misdemeanor."[62] The *Taranovich* court was quick to mention that "this is not to say that one's right to a speedy trial is dependent upon what one is charged with."[63] In *People v. Johnson*,[64] the court of appeals even went so far as to call this factor "of little significance" where the preparation of the case for trial "contributed very little, if anything, to the overall delay."[65] In *Vernace*, it seems that the fourteen-year period of inaction by prosecutors and law enforcement had nothing to do with the inherent complexity of such a serious crime.[66] In fact, it does not seem that any new investigation was conducted or new evidence produced.[67] The court spends no time discussing the complexity of the investigation or the complexity of the crime in defending the need for delays. Therefore, it appears that after *Vernace*, the court of appeals is more likely to allow the "nature of the underlying charge" to play a more dominant role in the balancing test when a defendant has been charged with murder,

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[62] People v. Taranovich, 335 N.E.2d 303, 306 (N.Y. 1975). The New York Court of Appeals stated:

> Appellant was arrested for attempted murder, a class B felony, and indicted for assault in the first degree, a class C felony. Upon such a serious charge, the District Attorney may be expected to proceed with far more caution and deliberation than he would expend on a relatively minor offense.

Id.

[63] *Id.*

[64] 342 N.E.2d 525, 531 (N.Y. 1975) (reversing a conviction and dismissing a manslaughter indictment because defendant's constitutional right to a speedy trial had been violated).

[65] *Id.* at 530.

[66] In fact, the appellate division describes how once Detective Mansfield of the "Cold Case Squad" reviewed the case in 1997, things came together in relatively short order. As the court described, "Mansfield interviewed the bartender, who had again been located, and 10 to 12 other people who were present at the time of the shootings." People v. Vernace, 711 N.Y.S.2d 492, 494 (2d Dep't 2000). Vernace was then identified and located in a relatively short period of time. *Id.* at 495.

[67] Rather than finding any new evidence, law enforcement and the district attorney's office seemed considerably more proficient at losing evidence over this period of delay. The appellate division freely conceded that a .38 caliber revolver, which had been linked to the murders, as well as several police reports were missing. *See id.* at 495.

particularly a sensational murder.

The court of appeals, in *Vernace*, found that the defendant was not deprived of his right to due process based on the delay, even if there were "some" prejudice to the defendant.[68] Both the court of appeals and the appellate division pointed out the difficulties the prosecution faced in light of lost evidence and a fourteen-year hiatus.[69] The appellate division even went so far as to state that "[c]ontrary to the defendant's claim, the delay in this case places the prosecution, not the [defense], at a tactical disadvantage, because the delay may have served to erode the memories of the eyewitnesses."[70] Seemingly, this statement implies that if the eyewitnesses do retain their memory, they will most certainly implicate the defendant. In any event, the appellate division held that "[u]nspecified claims that witnesses may have moved, or forgotten relevant material that those [police] reports may have contained, do not constitute actual prejudice."[71]

This holding, with respect to actual prejudice, was affirmed by the court of appeals even though it appears to represent a departure from prior case law.[72] In *Taranovich*, the court of appeals held:

> [I]f the delay precipitated by the prosecution resulted in the defendant's being unable to call certain witnesses, or if the duration of the delay was such that it might be expected that the witnesses would be less able to articulate exactly what had transpired, then the defendant would have a strong argument for dismissal of the indictment.[73]

Apparently, this once strong argument has grown considerably weaker. Whereas the court in *Taranovich* talked about a delay that "might" result in a hazy memory, the appellate division and the court of appeals in *Vernace* wanted specifics. This is an even greater departure from the court of appeals' opinion in *Taranovich* in which it held that "where in the circumstances delay is great enough there need be neither proof nor fact of prejudice to the defendant."[74] Furthermore, the

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[68] *See* People v. Vernace, 756 N.E.2d 66, 68 (N.Y. 2001).

[69] *See id.* at 68; *see also Vernace*, 711 N.Y.S.2d at 496 (Florio, J., dissenting).

[70] *Vernace*, 711 N.Y.S.2d at 495.

[71] *Id.*

[72] *See Vernace*, 756 N.E.2d at 67–68.

[73] People v. Taranovich, 335 N.E.2d 303, 307 (N.Y. 1975).

[74] *Id.*

court seems to have abandoned a policy statement it referred to in *Johnson*, which stated that the due process and speedy trial protection prevents a defendant "from being 'exposed to the hazard of a trial, after so great a lapse of time' that 'the means of proving his innocence may not be within his reach'—as for instance, by the loss of witnesses, or the dulling of memory."[75] Given the loss of the gun and police reports, as well as the dulling of memories, violations of these protections seem likely to have occurred in *Vernace*.

CONCLUSION

While bringing an alleged murderer to trial after so many years may seem to be a triumph, the reality is that a criminal defendant's right to due process may have been put in jeopardy by the New York Court of Appeals' ruling in *Vernace*. No matter the legitimacy of any justification offered by law enforcement or the district attorney's office—and there are, no doubt, questions about this legitimacy—it is undisputed that for fourteen years the investigation and potential prosecution of Robert Vernace was completely dormant. The rationale applied by both the appellate division and the court of appeals in *Vernace* represents a departure from prior case law that decreases a murder defendant's due process protection. First, the court of appeals accepted a justification for the delay that is vague and open-ended with almost no limit on how long law enforcement or the district attorney can wait before attempting to bring an indictment. Second, the appellate division and the court of appeals emphasized the sensational and inflammatory nature of the crime. This is a departure from prior cases that looked to the "nature of the underlying crime" to determine how long a prosecutor would reasonably spend investigating it. Instead of looking to the relative complexity of the crime, the court of appeals looked to the vicious nature of it. Finally, the appellate division and the court of appeals departed from prior cases in requiring the defendant to show "specific" prejudice, even after such an extensive delay that was not caused by the defendant.

Once again, while it may be comforting that law enforcement re-visited this case after fourteen years, it is clearly

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[75] People v. Johnson, 342 N.E.2d 525, 528–29 (N.Y. 1975) (quoting People v. Prosser, 130 N.E.2d 891, 893 (N.Y. 1955)).

discomforting that it was not addressed properly sooner. The court of appeals was too lenient in allowing prosecutors to go forward with this trial in light of these factors. In order to bring a murderer to justice, the court of appeals has sacrificed the due process rights of criminal defendants.